UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Case No. 01-1139 (JKF)
	.	
W.R. GRACE & CO.,	.	
et al.,	.	824 North Market Street
	.	Wilmington, DE 19801
Debtors.	.	
	.	October 26, 2009
. . . . .	.	10:34 a.m.

TRANSCRIPT OF HEARING
BEFORE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtors:	Kirkland & Ellis, LLP By: DAVID BERNICK, ESQ. JANET BAER, ESQ. 200 East Randolph Drive Chicago, IL 60601
For the Future Claimants Representatives:	Orrick, Herrington & Sutcliffe, LLP By: RICHARD WYRON, ESQ. Washington Harbour 3050 K Street, N.W. Washington, D.C. 20007
Audio Operator:	Sherry Stiles

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J&J COURT TRANSCRIBERS, INC.
268 Evergreen Avenue
Hamilton, New Jersey 08619
E-mail: jjcourt@optonline.net

(609)586-2311 Fax No. (609) 587-3599

APPEARANCES (Cont'd.):

For W.R. Grace:	W.R. GRACE By: RICHARD FINKE
For State of Montana Dept. of Environmental Quality:	Womble Carlyle Sandridge & Rice By: FRANCIS MONACO, ESQ. 222 Delaware Avenue, Suite 1501 Wilmington, DE 19801
For Arrowwood:	Wilson, Elser, Moskowitz, Edelman, & Dicker, LLP By: CARL J. PERNICONE, ESQ. 150 East 42nd Street New York, NY 10017
For Committee of Asbestos Personal Injury Claimants:	Campbell & Levine By: MARK T. HURFORD, ESQ. 800 North King Street Suite 300 Wilmington, DE 19701
For the Unsecured Creditors' Committee:	Strook & Strook & Lavan By: KENNETH PASQUALE, ESQ. 180 Maiden Lane New York, NY 10038
For the Bank Lenders:	Landis, Rath & Cobb, LLP By: RICHARD COBB, ESQ. 919 Market Street, Suite 1800 Wilmington, DE 19899
For the Bank Lender Group:	Landis, Rath & Cobb, LLP By: JAMES S. GREEN, JR., ESQ. 919 Market Street, Suite 1800 Wilmington, DE 19899
For PD/FCR:	Law Office of Alan B. Rich By: ALAN B. RICH, ESQ. 1201 Main Street Suite 1910, LB 201 Dallas, TX
For the Asbestos Creditors Committee:	Ferry Joseph & Pearce, P.A. By: THEODORE TACCONELLI, ESQ. 824 Market Street, Suite 19899 Wilmington, DE 19899
For the U.S. Trustee:	Office of the U.S. Trustee By: DAVID KLAUDER, ESQ. 844 King Street, Suite 2313 Wilmington, DE 19801

APPEARANCES (Cont'd.):

For Arrowood Indemnity Co.:	Bifferato Gentilotti LLC By: GARVAN McDANIEL, ESQ. 800 North King Street Wilmington, DE 19801
For Gloria Munoz:	Hildebrand, McLeod & Nelson, LLP By: ANTHONY S. PETRU, ESQ. QUYNH L. NGUYEN, ESQ. 350 Frank H. Ogawa Plaza, 4th Floor Oakland, CA 94616 Sullivan Hazeltine Allinson, LLC By: ELIHU E. ALLINSON, ESQ. 4 East 8th Street, Suite 400 Wilmington, DE 19801
For Maryland Casualty & Zurich Insurance:	Eckert Seamans Cherin & Mellott, LLC By: GABRIELLE V. CELLOROSI, ESQ. 4 East 8th Street, Suite 200 Wilmington, DE 19801 Connolly Bove Lodge & Hutz LLP By: KELLY CONLAN, ESQ. The Nemours Building 1007 North Orange Street Wilmington, DE 19801

TELEPHONIC APPEARANCES:

For the Debtors:	Kirkland & Ellis, LLP By: BARBARA HARDING, ESQ. 200 East Randolph Drive Chicago, IL 60601
For the Debtors:	Kirkland & Ellis, LLP By: CHRISTOPHER GRECO, ESQ. Citigroup Center, 153 East 53rd St. New York, NY 10022
For the Debtors:	Pachulski, Stang, Ziehl &Jones By: JAMES O'NEILL, ESQ. 919 North Market Street, 17th Floor Wilmington, DE 19899-8705
For the Asbestos Creditors Committee:	Caplin & Drysdale, Chartered By: NATHAN FINCH, ESQ. One Thomas Circle, NW Washington, D.C. 20005

TELEPHONIC APPEARANCES (Cont'd.):

For Allstate Insurance:	Cuyler Burk, LLP By: ANDREW K. CRAIG, ESQ. Parsippany Corporate Center Four Century Drive Parsippany, NJ 07054
For the Property Damage Committee:	Bilzin Sumberg Baena Price & Axelrod LLP By: MATTHEW KRAMER, ESQ. 200 South Biscayne Boulevard Suite 2500 Miami, FL 33131
For OneBeacon Ins. Co., Geico, Seaton Ins. Co., & Republic Ins. Co.:	Drinker Biddle & Reath LLP By: MICHAEL F. BROWN, ESQ. One Logan Square 18th and Cherry Streets Philadelphia, PA 19103
For the Libby Claimants:	Cohn Whitesell & Goldberg, LLP By: DANIEL C. COHN, ESQ. 101 Arch Street Boston, MA 02110
For CNA:	Goodwin Procter, LLP By: MICHAEL GIANNOTTO, ESQ. Exchange Place Boston, MA 02109-2881
For Ford, Marrin, Esposito, Witmeyer & Gleser:	Ford, Marrin, Esposito, Witmeyer & Gleser By: ELIZABETH DeCRISTOFARO, ESQ. Wall Street Plaza New York, NY 10005
For AXA Belgium:	Tucker Arensberg, P.C. By: MICHAEL A. SHINER, ESQ. 1500 One PPG Place Pittsburgh, PA 15222
For Sealed Air:	Skadden, Arps, Slate, Meagher & Flom, LLP By: DAVID TURETSKY, ESQ. One Rodney Square Wilmington, DE 19801
For the Unsecured Creditors' Committee:	Strook & Strook & Lavan By: ARLENE KRIEGER, ESQ. 180 Maiden Lane New York, NY 10038

For Continental Casualty Co.:	Goodwin Procter, LLP By: DANIEL GLOSBAND, ESQ. Exchange Place Boston, MA 02109-2881
For the Debtors:	Kirkland & Ellis, LLP By: THEODORE FREEDMAN, ESQ. Citigroup Center, 153 East 53rd St. New York, NY 10022
For the PD Committee:	Speights & Runyan By: DANIEL SPEIGHTS, ESQ. ALAN RUNYAN, ESQ. 200 Jackson Avenue, East Hampton, SC 29924
For Anderson Memorial Hospital:	Kozyak, Tropin & Throckmorton, PA By: JOHN W. KOZYAK, ESQ. DAVID ROSENDORF, ESQ. 2525 Ponce de Leon, 9th Floor Miami, Florida 33134
In Pro Per/Pro:	ALEXANDER SANDERS, JR.
For the Debtors:	Onex Credit Partners By: LEWIS KRUGER, ESQ.
For Various Claimant Firms:	Stutzman, Bromberg, Esserman & Plifka By: DAVID J. PARSONS, ESQ. 2323 Bryan Street, Suite 2200 Dallas, TX 75201
For Morgan Stanley Senior Funding, Inc.:	Katten Muchin Roseenman, LLP By: MERRITT PARDINI, ESQ. 575 Madison Avenue New York, NY 10022-2585
For Fireman's Fund Insurance Co.:	Crowell & Moring LLP By: LESLIE A. DAVIS, ESQ. MARK PLEVIN, ESQ. 1001 Pennsylvania Avenue, N.W. Washington, DC 20004

TELEPHONIC APPEARANCES (Cont'd.):

For Fireman's Fund Insurance Co.:	Stevens & Lee By: JOHN D. DEMMY, ESQ. 1105 North Market Street Wilmington, DE 19801
For Serengeti:	Vinson & Elkins, LLP By: ARI BERMAN, ESQ. Trammell Crow Center 2001 Ross Avenue, Suite 3700 Dallas, TX 75201
For Official Committee of Asbestos Property Damage Claimants:	Dies & Hile, LLP By: MARTIN DIES, ESQ. 1601 Rio Grande, Suite 330 Austin, TX 78701 LECG By: ALAN MADIAN, ESQ. 1725 Eye Street NW, Ste 800 Washington, DC, 20006 Hamilton, Rabinovitz & Alshuler By: DR. FRANCINE RABINOVITZ 26384 Carmel Rancho Lane, Suite 202 Carmel, California 93923
For the Property Damage Committee:	Bilzin Sumberg Baena Price & Axelrod LLP By: SCOTT BAENA, ESQ. JAY SAKALO, ESQ. 200 South Biscayne Boulevard Suite 2500 Miami, FL 33131
For the Bank Lenders:	Paul Weiss Rifkind Wharton & Garrison, LLP By: MARGARET PHILLIPS, ESQ. REBECCA ZUBATY, ESQ. ANDREW N. ROSENBERG, ESQ. 1285 Avenue of the Americas New York, NY 10019
For Asbestos Property Damage Claimants:	Scott Law Group By: DARRELL SCOTT, ESQ. 1001 East Main Street, Suite 500 Sevierville, TN 37864

TELEPHONIC APPEARANCES (Cont'd.):

For National Union Fire Insurance Co.:	Zeichner Ellman & Krause, LLP By: ROBERT GUTTMANN, ESQ. 575 Lexington Avenue New York, NY 10022
For the Future Claimants Representatives:	Orrick, Herrington & Sutcliffe, LLP By: ROGER FRANKEL, ESQ. KATE ORR, ESQ. Washington Harbour 3050 K Street, N.W. Washington, D.C. 20007
For State of California, Dept. of General Services:	Hahn & Hessen LLP By: STEVEN J. MANDELSBERG, ESQ. 488 Madison Avenue 14th and 15th Floor New York, NY 10022
For Official Committee of Equity Security Holders:	Kramer, Levin, Naftalis & Frankel, LLP By: DOUGLAS H. MANNAL, ESQ. 919 Third Avenue New York, NY 10022
For General Insurance:	Sonnenschein Nath & Rosenthal LLP By: ROBERT B. MILLNER, ESQ. Sears Tower Suite 8000 233 South Wacker Drive Chicago, IL 60606
For Official Committee of Asbestos Personal Injury Claimants:	Anderson Kill & Olick By: ROBERT M. HORKOVICH, ESQ. 1251 Avenue of the Americas New York, NY 10020-1186
For David T. Austern, the Future Claimants' Representative:	Phillips, Goldman & Spence, P.A. By: JOHN C. PHILLIPS, ESQ. 1200 North Broom Street Wilmington, DE 19806
For Ford, Marrin, Esposito, Witmeyer & Gleser:	Ford, Marrin, Esposito, Witmeyer & Gleser By: SHAYNE SPENCER, ESQ. Wall Street Plaza New York, NY 10005

TELEPHONIC APPEARANCES (Cont'd.):

For Official Committee of Asbestos Property Damage Claimants:	Brandi Law Firm By: THOMAS J. BRANDI, ESQ. TERENCE D. EDWARDS, ESQ. 44 Montgomery St., Suite 1050 San Francisco, CA 94104 Lieff, Cabraser, Heimann & Bernstein By: ELIZABETH J. CABRASER, ESQ. Embarcadero Center West 275 Battery Street, Suite 3000 San Francisco, CA 94111
For Grace Certain Cancer Claimants:	Montgomery, McCracken, Walker & Rhoads, LLP By: NATALIE D. RAMSEY, ESQ. 123 South Broad Street Philadelphia, PA 19109
For the Libby Claimants:	Cohn, Whitesell & Goldberg, LLP By: CHRISTOPHER M. CANDON, ESQ. 101 Arch Street Boston, MA 02110
For the PD Committee:	Speights & Runyan By: MARION FAIREY, ESQ. 200 Jackson Avenue, East Hampton, SC 29924
For Everest Reinsurance Co., et al:	Marks, O'Neill, O'Brien & Courtney LLP By: BRIAN L. KASPRZAK, ESQ. JOHN D. MATTEY, ESQ. 913 North Market Street Suite 800 Wilmington, DE 19801
For Official Committee of Asbestos Property Claimants:	Richardson Patrick Westbrook & Brickman, P.C. By: EDWARD J. WESTBROOK, ESQ. 174 East Bay Street Charleston, SC 29401
For Hartford Financial Service Group:	Wilmer Wilmer Cutler Pickering Hale & Dorr, LLP By: MELANIE R. DRITZ, ESQ. 399 Park Avenue New York, NY 10022

TELEPHONIC APPEARANCES (Cont'd.):

For Asbestos Property Damage Claimants:	Pryor Cashman, LLP By: RICHARD LEVY, ESQ. 410 Park Avenue New York, NY 10022
For David T. Austern, Future Claimants' Representative:	Lincoln International, LLC By: JOSEPH RADECKI GEORGE COLES
For National Union Fire Insurance Co.:	Zeichner Ellman & Krause, LLP By: MICHAEL DAVIS, ESQ. 575 Lexington Avenue New York, NY 10022
For W.R. Grace:	W.R. Grace By: MARK SHELNITZ, ESQ. 7500 Grace Drive Columbia, MD 21044
For the Debtors:	Reed Smith, LLP By: JAMES RESTIVO, ESQ. DOUGLAS E. CAMERON, ESQ. 435 Sixth Avenue Pittsburgh, PA 15219
For Travelers Casualty & Surety Co.:	Simpson, Thacher & Bartlett, LLP By: SAMUEL J. RUBIN, ESQ. 425 Lexington Avenue New York, NY 10017
For a Creditor:	Bilzin Sumberg Baena Price & Axelrod LLP By: JOE SCHWARTZ, ESQ. 200 South Biscayne Boulevard Suite 2500 Miami, FL 33131

THE CLERK: All rise.

THE COURT: Good morning. Please be seated. This is the matter of W.R. Grace, Bankruptcy Number 01-1139. I have a list of participants by phone. Scott Baena, Janet Baer, Ari Berman, David Bernick, Thomas Brandi, Michael Brown, Elizabeth Cabraser, Douglas Cameron, Christopher Candon, Daniel Cohn, George Coles, Andrew Craig, Leslie Davis, Michael Davis, Elizabeth DeCristofaro, John Demmy, Martin Dies, Melanie Dritz, Terrence Edwards, Marion Fairey, Nathan Finch, Roger Frankel, Theodore Freedman, Michael Giannotto, Daniel Glosband, Christopher Greco, James Green, Robert Guttmann, Barbara Harding, Robert Horkovich, Brian Kasprzak, John Kozyak, Matthew Kramer, Arlene Krieger, Lewis Kruger, Richard Levy, Alan Madian, Steven Mandelsberg, Douglas Mannal, John Mattey, Robert Millner, James O'Neill, Kate Orr, Merritt Pardini, David Parsons, Carl Pernicone, Anthony Petru, Margaret Phillips, John Phillips, Mark Plevin, Francine Rabinovitz, Joseph Radecki, Natalie Ramsey, James Restivo, Andrew Rosenberg, David Rosendorf, Samuel Rubin, Alan Runyan, Jay Sakalo, Alexander Sanders, Joe Schwartz, Darrell Scott, Mark Shelnitz, Michael Shiner, Walter Slocum, Daniel Speights, Shayne Spencer, Brandi Thomas, David Turetsky, Edward Westbrook, Richard Wyron, and Rebecca Zubaty. And I'll take entries in court, please.

MR. BERNICK: Good morning, Your Honor. David Bernick for Grace.

MR. BAER: Good morning, Your Honor. Janet Baer for Grace.

MR. PASQUALE: Good morning, Your Honor. Ken Pasquale from Stroock for the Unsecured Creditors' Committee.

MR. COBB: Good morning, Your Honor. Richard Cobb for the Bank Lender Group.

MR. HURFORD: Good morning. Mark Hurford, Campbell & Levine, for the ACC.

MR. WYRON: Good morning, Your Honor. Richard Wyron of Orrick for the PI FCR.

MR. McDANIEL: Good morning, Your Honor. Garvan McDaniel and Carl Pernicone for Arrowood.

MS. MAKOWSKI: Good morning, Your Honor. Kathleen Makowski from Pachulski for the debtors.

THE COURT: Excuse me. One second.

(Pause)

THE COURT: Okay. Thank you.

MR. TACCONELLI: Good morning, Your Honor. Theodore Tacconelli for the Property Damage Committee.

MR. ALLINSON: Good morning, Your Honor. Elihu Allinson for lift stay movant Gloria Munoz.

THE COURT: Good morning.

MS. CELLOROSI: Good morning, Your Honor. Gabrielle Cellorosi for Maryland Casualty and Zurich Insurance.

MS. CONLAN: Good morning, Your Honor. Kelly Conlan

for Maryland Casualty and Zurich Insurance.

THE COURT: I'm sorry. What was your name? I apologize.

MS. CONLAN: Kelly Conlan.

THE COURT: Okay. Thank you.

MS. CONLAN: Thank you.

THE COURT: For?

MS. CONLAN: Maryland Casualty and Zurich.

THE COURT: Thank you.

MS. CONLAN: Thank you.

MR. RICH: Good morning, Your Honor. Alan Rich for the PD FCR.

MR. MONACO: Good morning, Your Honor. Frank Monaco of Womble Carlyle for the State of Montana.

(Pause)

THE COURT: Good morning.

MS. BAER: Good morning, Your Honor. Janet Baer again on behalf of Grace. Your Honor, I want to take very quickly to get through the items on the agenda that are not opposed, so we can get to the contested matters.

Agenda Item Number 1, Your Honor, the Massachusetts Department of Revenue claim objection, that matter's being continued again to November 23rd. That is working its way through the Department of Revenue and the IRS, which is why it keeps getting continued.

Agenda Item Number 2, Your Honor, is the debtors' 25th omnibus objection. There are a number of matters still pending in that objection. All but the Munoz one are being continued to November 23rd. The objection to the Munoz claim will be discussed in conjunction with matter Number 23, which is Munoz's lift -- motion to lift stay, so I'd just like to pass that particular matter for right now.

THE COURT: All right.

MS. BAER: Agenda Item Number 3, Your Honor, the objection to Maryland Casualty's claim, by agreement of the parties, that's been continued to the December 14th omnibus hearing.

Agenda Item Number 4, Your Honor, the Fireman's Fund lift stay motion, the parties are discussing that matter and trying to resolve it. That's also being continued to November 23rd.

THE COURT: All right.

MS. BAER: Your Honor, that takes us to Agenda Items 5 through 18, which are all property damage settlements with certificates of no objection having been filed. I understand that they're starting to hit the docket. That instructions have been given to sign all those orders.

THE COURT: That's true, and also 20 through 22.

MS. BAER: Thank you, Your Honor. Agenda Item Number 19, Your Honor, is the General Insurance motion to lift -- I'm

sorry -- motion to file a late proof of claim. The parties are also discussing that matter and how to address it. That is being continued by agreement to November 23rd.

With the matters 20 through 22, as you indicated, orders being entered, that leaves on the agenda, Your Honor, agenda Items Number 23, the Munoz lift stay, 24, just a confirmation status, and 25 is the motion with respect to Mr. Frezza, which we'd like to take first, and Mr. Bernick will address that matter.

THE COURT: All right.

(Pause)

THE COURT: What is this? Did the debtors file a brief, because if they did, I haven't seen it.

MR. BERNICK: No, Your Honor. In fact, I'll be taking that up in just a moment. Remember that we filed -- we filed -- we made our motion orally, and then in connection with -- this is a motion -- a Daubert motion orally. And then in connection with the hearing that took place -- I guess it was really the end of the confirmation hearing in matters -- the Court turned attention to the issue of how we would be taking up matters going forward. We indicated that we wanted to have a Daubert hearing take place. This is actually in the context of the day that was set aside in part for Daubert hearings. So we were prepared to argue that oral motion, and then we reached agreement with counsel for the other side. In fact, we would

not argue it, because they hadn't had the opportunity to brief it.

So we had our oral motion. We then submitted as part of Your Honor's binder on the Daubert -- that binder contained information relating to the Libby opinions. And the last tab of Your Honor's binder was a clip of materials that we submitted to the Court that we're going to use for argument. We simply submitted it to the Court, and there was no objection to our doing that.

So following all that, per the schedule that was agreed, the lenders and the unsecured creditors then filed a brief. So they filed a responsive brief, which is in the binder for today. So we had an oral motion, a submission in support of the oral motion, and then we had -- which was the submission that was made at the hearing and is in your binder. And then we had further a brief that was filed in opposition. I'm sure Your Honor has that brief.

THE COURT: I do have that brief.

MR. BERNICK: Okay.

THE COURT: I expected to get something from the debtors.

MR. BERNICK: Well, there was no --

THE COURT: It's your motion.

MR. BERNICK: There was no -- there was no provision that was made for a reply brief, Your Honor, and, as a

consequence -- and this is something that, basically, we were prepared to do in service of getting this matter heard for today. So --

THE COURT: Well, I'm willing to hear it today, because I've had an opportunity to take a look at the brief that was filed and a review -- Mr. Frezza's testimony, and, frankly, at this point I don't think there's grounds to strike it. It seems to me that everything that the debtor is arguing at this point goes to the weight not to the admissibility.

Mr. Frezza, and to a certain extent, Ms. Zilly were quite clear on the method that was used to come up with the opinion that was offered. I just -- I don't see a basis for a Daubert challenge.

MR. BERNICK: Well --

MR. PASQUALE: Your Honor, if I may -- and thank you for the comment, but we just were handed this.

THE COURT: Yes, I see that.

MR. PASQUALE: And I haven't seen any of this material. There were new demonstratives in here. I can call the Speights Rule. But this is not acceptable, and I have no idea -- I've not even tried turned the pages yet in listening to Mr. Bernick first. I'm not prepared to address anything other than the sheet that was handed out in court and, of course, the issues raised orally and in our papers. But I don't know what's even here, Your Honor.

MR. BERNICK: Yes, that is entirely disingenuous. First of all, I'm going to create the charts. This business about the charts was really developed initially -- was initially developed, because people were coming to court with new material, and now it's been used as an excuse to basically say you can't submit anything that may actually be of aid to the Court, because they don't have notice of it, and that's really absurd. That's what led us to the exercise that took place in the confirmation hearing where you can't even have witnesses testify using demonstratives, because in some fashion that's leading. I --

MR. PASQUALE: Your Honor, it's not the fact of --

MR. BERNICK: Excuse -- excuse me, Mr. Pasquale, I did not interrupt you. So I'm going to create the charts that we're talking about here today, and I'm prepared to go forward, and I think that I will persuade Your Honor that, in fact, this is a clear Daubert case. If Your Honor wished to have a reply brief, we can submit a reply brief, although in point of fact, we will be submitting our trial -- our post-trial brief anyhow on November the 2nd.

But the fact of the matter is that we set this whole thing up in service of the proposition of getting this matter heard on Daubert as a threshold matter in doing so promptly, and that's why we didn't submit a brief. But I --

THE COURT: But I didn't have a Daubert motion from

the debtor --

MR. BERNICK: Yes, there --

THE COURT: -- with respect to Mr. Frezza.

MR. BERNICK: Well, the --

THE COURT: The oral motion was made, but there was a time schedule set for raising those issues.

MR. BERNICK: No, Your Honor, I respectfully -- and I know that a lot of things have happened, but that's not the way that it was left. The way that it was left was that we filed -- we made an oral motion, and then by agreement -- we reached an agreement not to argue this during all the Daubert proceedings.

THE COURT: That's right.

MR. BERNICK: In lieu of that, that there would be an -- our motion would be oral, that it would be supported -- our initial piece would be supported by the submission that was contained in Your Honor's binder that --

THE COURT: But that was a chart. That wasn't a brief.

MR. BERNICK: I understand that.

THE COURT: Okay.

MR. BERNICK: And that the agreement then was that they would file -- they would respond to that. There was no agreement, and there was no schedule that contemplated we'd be filing any brief.

THE COURT: Okay.

MR. BERNICK: And that's how it ended up here.

THE COURT: That's fine. If you want to argue a motion without a brief on a matter like this, go ahead.

MR. BERNICK: Well, I don't want to --

THE COURT: I'm prepared to hear it.

MR. BERNICK: I don't want to --

THE COURT: I've the lenders', and I'm prepared to hear it. I don't know what it is that you've submitted. Let's walk through it. Go ahead.

MR. BERNICK: Well, I apologize, Your Honor, if it was a misunderstanding. I thought that we were all reading off exactly the same page, and this was not -- this was to be argued today. In lieu of a reply brief, we are going to argue it today, so that the matter would be right for today. And if I made a mistake, I apologize, but this was exactly the agreement that was reached with counsel before we came in. It was --

THE COURT: Okay.

MR. BERNICK: -- they would be only ones --

THE COURT: That's fine.

MR. BERNICK: -- with a brief.

THE COURT: Let's get to the merits.

MR. BERNICK: Okay. So with respect to the law on Daubert, I don't think that there's very much about the law in

Daubert that's disputed here, except that we're still dealing with -- this has no battery. Oh, it does now. It went from red to green. We're still dealing with one artifact that comes out of the lenders and the unsecured creditors brief, and that artifact is the notion that practical experience of an expert is sufficient to satisfy 702/703. Their brief cites in Footnote 3 the McCullough case for the proposition that Mr. Frezza's qualified to render a solvency opinion based upon his specialized knowledge gained through experience, training, or education.

Unfortunately, that is old law. There's a case called Kumho Tire that was decided by the Supreme Court subsequently to the McCullough case. The McCullough case indeed has been limited by subsequent decisions of the Second Circuit. The Kumho tire case specifically addressed the question of practical experience and said no go. There still has to be a reliable methodology, otherwise, practical experience amounts to ipse dixit or back to the same problems all over again.

So the notion that practical experience gets you there is just not so, and indeed the submissions that the lenders and unsecured creditors made as part of their brief indicates, in fact, there are standards that govern methodologies that have been adopted and govern the testimony of people within his field. So practical experience is not

sufficient. They can't get around the fact that in his field, in order to issue a valuation decision, you need a certification. He doesn't have that certification.

Now, they are in pains in the course of their brief to introduce the AICPA standards and say, well, this is really not the same thing as a valuation opinion. And I'm going to return to that before I close my remarks, but let me say that again their reliance on practical experience in their brief speaks volumes, because that's really what it is that Mr. Frezza claims to have is practical experience in doing a lot of this kind of thing, and that is not sufficient to get you to the point of being qualified under 702/703.

We then come to the question of, well, is there a dispute on the law? Should there be a dispute on the law as to what solvency is? And this now has emerged as an issue in their brief, and really for the first time they've really taken on the whole question of, well, what really is solvency at the end of the day. And the answer to that is that there should not be a dispute, because again the Code actually defines what insolvency is.

The Code definition is at Section 10132(a). Insolvency is a -- "a financial condition such as the sum of such entity's debts is greater than all of such entity's property at fair valuation." And the cases are clear that this is basically -- and this is important -- basically a balance

sheet test, but it is not the same thing as a balance sheet. It is not controlled, and it is not governed by GAAP. It is the assets at fair valuation, not something that may be carried on the balance sheet, and it is the liabilities that are the actual liabilities, even if they're not properly useable under GAAP.

And, Janet, if we could turn around the first chart here? We're here talking about the amount of the actual liability. That's what all the cases say. We've got a series of cases that are in the binder. Here they include Waccamaw's Home Place which is a District of Delaware decision 2005, In re: Wallace Bookstores, Eastern District of Kentucky 2004, and then, importantly, the Transworld Airlines decision which specifically deals with the question of -- in Covey, which is out of the Seventh Circuit, both of which specifically deal with the question of what is the nature of the obligation that's at issue that is a debt, and how is it that it's -- how is it that it's determined. And the classic example of the situation in which GAAP liabilities are not the same as actual liabilities is the -- are the facts of this case. They're contingent liabilities. Contingent liabilities aren't necessarily accrued and presented under GAAP, and that's the whole FAS 5 issue.

But the courts are clear, and this is out of the Transworld Airlines decision of the Third Circuit, "Bankruptcy

Court -- agree with the Bankruptcy Court it is proper to consider contingent liabilities when evaluating the insolvency of a corporation." And so the whole question of what liabilities we're dealing with, it is the actual amount of the liabilities, and I really want to underscore that here we are talking about actual liabilities rather than some hypothetical liabilities.

THE COURT: Okay, but here's my question though. I understand the argument that you're making, and I doubt that there's a disagreement about the fact that we're looking at actual liabilities in some fashion. But the question is assuming that this plan is confirmed and goes effective, this plan sets the debtors' liability, because it sets the contribution that the debtor has to pay, and everything else is going to be discharged against this debtor.

MR. BERNICK: That --

THE COURT: So that does set the liability.

MR. BERNICK: I disagree, and I'm going to get there. The first step is what does the Code say, and the Code says they must be the actual liabilities. They are not hypothetical liabilities. They are not it may be liabilities. They are the actual liabilities.

THE COURT: Well, now, just -- but just a second. The Code definition is typically used to determine whether or not a debtor is solvent for purposes, I think, other than plan

confirmation. And, for example, that definition is routinely not used in certain actions that take place under the Code. So the fact that the definition is there I don't think drives whether or not on confirmation, on the effective date, that the debtor is judged by that same solvency. But if it is, then it seems to me, that the plan at that stage states what the liabilities are.

MR. BERNICK: Again, Your Honor, the -- step one is the definition, and the definition is not just the -- the definition is the Code definition. It is consistently applied by the courts to be a definition that focuses on the reality, not some projection, not some what if, but what is the case. That's step one.

THE COURT: Right, but that is the reality.

MR. BERNICK: No, it's not the --

THE COURT: The debtor will be subject on the effective date to pay a maximum -- in fact, a dollar sum regardless of what it's liabilities are.

MR. BERNICK: That's not -- that actually is not even -- that is not even true.

THE COURT: Well --

MR. BERNICK: It's not even true in the following sense. But I don't think you get there under the Code definition. I mean --

THE COURT: Wait. How isn't it true?

MR. BERNICK: It's not true, because the plan's on the -- that's before the Court doesn't call for this. It doesn't call for it at all.

THE COURT: What -- doesn't call for what?

MR. BERNICK: It calls for a specified rate of interest. It doesn't say -- the plan before the Court doesn't say --

THE COURT: Oh, no. No. No. That's not what I'm talking about. I'm sorry. I'm talking about the amount of the tort -- personal injury tort claims.

MR. BERNICK: Same thing.

THE COURT: I thought that's what the issue was.

MR. BERNICK: Well, no, but they're all part and parcel of the same thing. Let me go forward. Just give me a couple minutes, Your Honor, and we'll take the thing up. But the base line point is solvency is an exercise in reality. It's not the -- an exercise in hypotheticals. And the only reality -- and this is where there's a misstatement in their brief, and it's just -- it's very, very prominent. It's very important.

They say that there is no opinion regarding solvency in this case other than Mr. Frezza's opinion. That's what they say. That's false. Ms. Zilly specifically issued an opinion, and it's in the materials -- the transcript pages are in the materials, and it says you can't determine solvency on these

facts. It is where you have -- the amount of liability is so much in dispute, and Mr. Frezza agrees. He says the same thing. That is if you take the actual facts about what is in place during this period of time and remains true today -- as we sit here today, there is record -- undisputed record evidence that the liabilities are actually disputed, and, therefore, you can't determine solvency. And that is the opinion of Ms. Zilly. She testified, and Mr. Frezza on cross examination conceded it.

THE COURT: But you made a statement about this period of time. I don't know what the this --

MR. BERNICK: This period of time is prior to the effective date. That's why I've got it on this side of the chart.

THE COURT: All right.

MR. BERNICK: Okay, so all of this really is undisputed. There is no question -- there's no question but that until that plan goes effective, the liabilities are disputed, that the opinions that have been offered by both experts is that we can't possibly find solvency. Mr. Frezza says that, and in the cross examination -- I'll show it to Your Honor, if you'd like -- Ms. Zilly says it. They say that there's no such opinion by Ms. Zilly. That's flat wrong. And to contradict it, we brought indeed expressly for the purpose of issuing the opinion saying given the dispute about actual

liabilities, you can never offer an opinion about solvency.

THE COURT: You can't at that time.

MR. BERNICK: Absolutely.

THE COURT: Okay.

MR. BERNICK: So we're all agreed on that. This is the period of time, incidentally, Your Honor, when the plan gets negotiated. The plan doesn't get negotiated after the fact. The plan gets negotiated before the event becomes effective.

THE COURT: Yes.

MR. BERNICK: So, as we're sitting in the context of a bankruptcy, this now begins to address the question of timing. We're sitting here in the context of a bankruptcy, and we're saying, okay, we've got to figure out how to negotiate a plan, and the only way that we can get on the record to date and in the marketplace this record reflects -- that only way that we can get to a plan is with a plan that limits the payout to PI way below what they want, that limits all kinds of people, and it limits the amount of default interest. That is a part of the plan. It is a significant part of the plan. It's a precondition of the plan, and it was all negotiated in the context where nobody could say there was solvency.

So now we get to Your Honor's question. The plan goes forward, limited payout for PI, if it goes effective, a determined rate of interest, and Mr. Frezza comes on to the

scene, and the issue becomes, well, what does Mr. Frezza do. And it's clear that all of his analyses, every single one of his analyses say it's solvency as of the effective date giving effect to the plan.

THE COURT: Yes.

MR. BERNICK: As of the effective date giving effect to the plan. And, of course, as Your Honor points out, if you give effect to the plan, there's no PI liability. There's none. It's gone. It disappears. Now, it didn't just disappear, because the issue is resolved and all of a sudden it became apparent that under the Code Grace was solvent. That is completely and utterly counterfactual. The plan came into existence, and if it goes effective, yes, the PI liability will disappear, only because the plan is there. Only because the plan is there.

So we're sitting here in the context of a Chapter 11 saying, gee, how do we get to the point of reorganization. How do we get done with this case? And the overwhelming problem with this case are a lot of high competing demands, including the demands of the unsecured creditors, and the central problem is the PI case. And we reach agreement with the PI and indeed, as Your Honor well knows, we reach agreement with the PI in the context of a long history of dealing with the unsecured creditors on what we felt to be a very fair and equitable basis as did they. And in this context, trying to

get to the finish line, we reach a plan. The plan is absolutely integrated, negotiated down to the last dollar.

Now, in that negotiation there is no question that the solvency was disputed, absolutely no question. So the proposition that Mr. Frezza advances and in service of which the argument of the brief is made is that, oh, I'll tell you what. If it turns out that the plan produces a solvent company, there's default interest. If, if, if, if, if. That is an absurd proposition. Absurd proposition.

And why is it absurd? What reorganization is going to produce an insolvent company?

THE COURT: I've had several that have been confirmed even though I made findings that they wouldn't reorganize, that three days later filed a new bankruptcy --

MR. BERNICK: Oh, okay. Okay, but that's --

THE COURT: -- in a different district.

MR. BERNICK: That's not the way the world --

THE COURT: Having taken their DIP financing --

MR. BERNICK: -- ideally --

THE COURT: -- and used it.

MR. BERNICK: Yeah, okay. Okay. Well, it would make it all the more absurd if in that context every one of those creditors got default interest. Oh, well, let's make it worse. Let's pile on the default interest, and that will make the whole thing all cool. Well, the fact of the matter is that

when you give effect to a plan of reorganization, of course, there's not going to be insolvency. The test -- indeed the tests of the Code are designed to foreclose that result by saying there must be a showing of feasibility.

Feasibility, incidentally, is the very predicate of their expert's work. He says, oh, well, the plan's feasible, therefore, you must be solvent, therefore, you get default interest. It is completely backwards. Reorganization. Successful, actual liability can't be ignored, because, otherwise, you would never get to the point of having a negotiation that actually produced a reorganization. You would slay the goose that lays the egg. Everybody's got to deal with actual liability. And when they're dealing with liabilities, you can't then say, well, if it turns out that you put it all together in a package and it works, guess what, there is an add on of default interest that would undercut the fabric of the -- certainly undercut the deal that we have, completely contrary to the purposes of reorganization. That's one.

Two. It's contrary to the Code. The Code has as the test for whether there can be default interest fair and equitable. Fair and equitable does not equal feasible, because, otherwise, if -- it's feasibility is always forward looking from the plan. Fair and equitable says what is fair and equitable given the whole history. It looks backwards a well as forward. So if we're talking about fair and equitable

that's driving this whole equation, it encompasses the whole history. It doesn't simply go forward like feasibility.

So, effectively, the argument that you hear these people make, it is, Your Honor, it's an argument that makes a mockery of the whole idea that Your Honor has to balance fair and equitable. It replaces it with a formula, and the formula is if it turns out you have a successful reorganization, you get default interest. Almost every Chapter 11, there would be a formula, and say, oh, we're all done. The plan provides it's a successful reorganization. There's equity that's left over, and as a consequence, we're free and clear. Forget about those pesky liabilities. They're all gone, and we get default interest.

That's not the test. The test is whether it's fair and equitable. And if fairness and equity is determined, by taking a look at solvency in the real world, which is the solvency that existed in the context of which the plan was developed, and if it turns out you solve the solvency -- the dispute of liability problem, of course, you're going to do that.

Now, there's a case that deals with this. The argument is so extreme. We looked around and say has anybody ever said, well, just because the Chapter 11 is successful as a reorganization, that means that, well, gees, everybody gets paid default and couldn't find a case like that. But there is

a case called New Valley -- Valley View. New Valley is a different favorite case. Now, Valley View decided District of Kansas at 20 -- at 260 Bankruptcy 10, 2001, and it specifically -- the interesting thing about that case is that it has one analysis for feasibility, and it has another analysis for whether you award default interest. And, of course, the plan is one that produces feasibility, but the question is yes, it's feasible, but no, we're not going to award default interest.

Now, given their view of the case, feasibility controls, because the world is simply what is consequence of the plan, and that's why every single thing that their expert talks about is all based upon the feasibility view. That is if this plan goes into effect, in fact, there will be enough money to pay everybody in the world. God bless. Well, of course, that's true. It's self-evident from the proposition that it purports to be a plan that's feasible. That ain't the test. This case specifically recognizes that.

So when Your Honor poses the question and says, well, gee, isn't it true that as of a certain date giving effect to the plan, there will be solvency, yeah, there will be solvency, at least given some analysis of solvency. Notably, Your Honor, actually under the '09 pro forma there is negative equity. On a balance sheet basis there is negative equity. The only way that their expert can get above negative equity and get positive equity is to -- is to -- he takes the balance sheet

for those purposes, but then he adds to the balance sheet and says, well, we've got to have fair market value. You've got to consider enterprise value, and it's with enterprise value that he gets over the top and then is able to say that there is equity, positive equity. But on a pro forma balance sheet basis, the company has got negative equity.

But all of that is an exercise in after the fact. So first basic problem is that he completely -- now we've been through like five different versions of what is the rule when default interest is awarded, five different versions. And the first version was, well, if the stock's trading now in a positive value, well, there's clearly solvency. Then the next version was, well, if there's any recovery at all for the -- there's a presumption of solvency, then there was no presumption of solvency. And if there's any money at all left over at the end of the day, well, then clearly there's solvency. We're now into another immigration and a very revolutionary one which is throw out fairness and equity. Every time you have a test for reorganization, there's money there. But we're still not yet to Mr. Frezza. I'm going to run out of colors here.

Mr. Frezza is a bold soul. So what does he do next? He says it's not just giving effect to the plan. It's giving effect to a changed plan, a different plan. And what is that different plan? One, the interest is determined by the Court.

Now we had a plan like that in the Dow Corning case. Rather than specify something, they said, oh, we'll leave it up to the Court to decide, and it'll simply be plugged in. That's not this plan. This plan says here's a rate of interest, and the reason it says here's a rate of interest is that these folks were completely and utterly satisfied with it all the way to the time the plan was proposed. Even when the plan was proposed, they simply didn't object to it. They simply said, well, we want to reserve the right of individual lenders to come in and say they disagree.

So there's a whole history here built into fairness and equity based on fairness and equity that is -- drives this plan, and it is not a fill-in-the-blank plan. Mr. Frezza is working with a different plan not a fill-in-the-blank plan. He's working with one that specifies a rate.

And number two, his analysis has a different payout for PI. Well, it's an absurd thing we ever heard. He says, oh, we're going to take -- instead of having the amount that is paid out under this plan to the personal injury claimants, we're going to substitute a different value. That is Mr. Florence's value, which is a lower payout and make that work. Give me a break. He himself recognized -- and this is the ultimate definition of fit. Is there fit -- here's what he said, Page 318.

"Q I'm suggesting to you that the analysis that you've done

is contrary to historical fact."

MR. BERNICK: That's what I ask him.

"Q Can we agree on that?

"A I guess we can agree on that, yes.

"Q Okay, and in point of fact, it's so bad that you've recognized that the plan proponents -- if the PI claimants' representatives would've been presented with the idea of agreeing to the Florence estimate, that they would've said when hell freezes over. Right?"

MR. BERNICK: And there's a little colloquy on that. And then I ask --

"Q They probably would've said when hell freezes over. Right?"

MR. BERNICK: He says --

"A I can't answer that."

MR. BERNICK: And he says -- I said --

"Q Well, you did at your deposition."

MR. BERNICK: He says --

"A I know."

MR. BERNICK: He then admits that that is what he said during his deposition. That is the essence, Your Honor, when you give effect to the plan in doing an analysis of what rate should be applicable in a negotiation process that led to the plan and was based on actual liability. And then when you go further and change the plan, that is the whole problem of

fit. It doesn't fit the facts, and it doesn't the law. And, Your Honor, if -- you could say it goes to the weight of the evidence. Sure, it goes to the weight of the evidence if they didn't have these basic problems that make it not fit the facts and not fit the law.

It's not a situation where you have to weigh his credibility. The reason that this is not a question that goes to the weight of the evidence, it's a threshold issue that the facts in the law is that everything is that we're saying -- every single thing that we're saying he admits. He admits that you can't determine solvency based on the actual liabilities. He admits that he'd give us effect to a plan that liquidates the PI liabilities, and he admits that he changes that plan. You don't have to weigh a credibility. It's not a weight issue. He has admitted it flat on cross examination. So it's an issue of law, and it's an issue of admitted and undisputed facts.

What about reliability? And then I'll sit down. Expertise and reliability. Well, he said, oh, you guys forgot about the AICPA. And under the AICPA he doesn't have to do a valuation as a valuation expert. Well, what's interesting about the AICPA is the AICPA, which is Exhibit D to their brief, and we have attached it in our exhibit as well, says, you have to do all three approaches, which is adequate capital, cash flow, and balance sheet. He didn't do adequate capital.

Didn't do it, by his own admission. Didn't do it, and, therefore --

THE COURT: I think -- the AICPA standard, if I -- I think -- I better go back and check, but I think it said that if the debtor failed on any of the tests, there wouldn't be solvency. That's why --

MR. BERNICK: He has to do all --

THE COURT: -- you had to do all three.

MR. BERNICK: -- three tests.

THE COURT: Right, and if the debtor failed any of them, there would not be a determination of solvency.

MR. BERNICK: But he didn't follow the procedure. He didn't do all three. I'll take a look, Your Honor. I honestly don't remember.

THE COURT: All right.

MR. PASQUALE: That's correct, Your Honor.

THE COURT: That is correct. Okay. Thank you.

MR. BERNICK: He then says does he have the expertise to quantify liability, and the answer is no. He's admitted that. Doesn't have it. They don't purport to say that he does.

But what they then say is did he quantify liability, and they say no, that's not true. He didn't quantify liability. That's obviously completely contrary to fact. Of course, he quantified liability. He quantified liability,

because that was the only way that he could actually put numbers into his charts. This is right out of his report. He's got his two little tables of the balance sheet analysis. They both quantify the liability. You've got quantification of 395, and you've got quantification that's -- he basically says that on quantifying liability, to the extent that I now take the pro forma, and in the pro forma I either use the liability to the trust that's built into the plan as it is, or I use the liability based upon the Florence estimate. Those are both quantifications of liability. So he selected them.

And even more importantly -- even more importantly, what about the decision to use those liabilities as opposed to these liabilities, the actual liabilities? He had to make a selection. He had to decide how to use the balance sheet test. And in order to do so, he had to quantify liabilities. He could've gone pre the effectiveness of the plan and used the actual liabilities. He could've gone post but used the actual liabilities that are in the plan, or he could've done -- what did Tom Florence -- he's the one that made those selections.

Now, the lawyers gave him the last one, but he was the one who decided he was going to testify about it. So to say that he didn't quantify is completely illusory. You couldn't have a balance sheet analysis without the quantification. So he most certainly did quantify. He made a selection.

And then the question is when he made the selection, was there a reliable methodology that was applied? That is he's now got all these different options. He can take the Florence number. He can take the Peterson number. He can take a mix of those numbers. He can take no numbers. He can take the plan numbers. He can do whatever he wants. He made that decision. He made it.

And the question then is in doing so was there any reliable methodology that was applied? Now, Your Honor, the simple thrust of it is you go back over and you take a look at their briefs, everything that they've said. Where did they say here is the methodology that I used in selecting -- not selecting A, not selecting B, selecting C, and then within C? That is a different plan making the changes that I did. He had lots of options.

What methodology did he use in making that selection? You can't find it anywhere in their brief. You can't find it anywhere in his testimony. It doesn't exist. And the reason it doesn't exist is we all know what's going on. This all stands in service -- he's now the second expert that they've tried to put together to -- this stands in service of a purely legal construct. The construct that they're wrestling with here is not a construct within the world of financial analysis. It's not a construct within the world of solvency analyses done by financial advisors. This entire construct is all legal

argument, and they made the legal arguments, and they're just having him go fill in the blanks. That is classic gatekeeper function. And, Your Honor, it is true, as their briefs says, that often judges are reluctant to decide under Daubert, because they say, well, let's wait for the trial.

We have been extremely -- and we've been up front that Your Honor likes to see everything. You have now seen everything, and the issue now is whether it passes Daubert, and that is not a question of, in a sense, management. Do I wait or do I do something? It's all done. We're here. The real question is is there -- is it correct that it passes 702/703? And that is an issue of law. It's not an issue of weighing and balancing credibility. It is an issue of law and the undisputed facts, and it then becomes -- it is -- it's mandatory. This is the whole idea of Daubert, the gate keeping function, and this is a piece of testimony where a guy came in who has never done a solvency expert analysis, never done a solvency report before, never testified as to a solvency opinion before by his own admission, and he basically went down a road that is unbelievably sophisticated legally, not because of a methodology that exists in his business.

Your Honor, we have the clip of materials that we'll tender -- will be tendered to the Court, but that will be the materials that we'll rely upon to supplement our arguments that are in the record. Thank you.

THE COURT: Mr. Pasquale.

MR. PASQUALE: Thank you, Your Honor. Ken Pasquale from Stroock for the Unsecured Creditors' Committee. We've now heard what I'm sure we're going to hear again in January, which is Mr. Bernick's -- part of Mr. Bernick's closing argument on the issues of solvency and the Committee's and the lenders' objections to the plan. We didn't hear a Daubert argument. Yeah, I heard Mr. Bernick use the name of the case and tried to fit it to the standard, but that's not what we just heard.

When Mr. Bernick talks about fit, that's an argument of fit to Mr. Bernick's theory of the case. It's not an argument of fit to the solvency issue before the Court, because the issue before the Court is solvency as of the effective date under the plan before this Court. Why is that? We've objected to that plan. It's a confirmation hearing of that plan.

Ms. Zilly testified quite clearly on direct, and I think Mr. Bernick pretty much acknowledged it, that as of confirmation, should this Court confirm the plan, the asbestos liabilities are resolved. They're done. They're over. We have a number. We know what they are. There's no question about that.

The argument the objection that the Committee and the lenders have made is for post-petition interest under that plan. Now, Mr. Bernick spent a lot of time. He was very animated about this whole idea that every plan is solvent as of

the effective date. Every plan does not have a 2 billion -- almost $2 billion today recovery for equity. This plan is different.

And we are not ignoring fair and equitable. We spent a whole day with witnesses on that issue. Solvency's different. We agree. I mean we -- we've -- I remember standing up here six weeks ago, or whenever it was, Your Honor saying I don't understand why we're arguing solvency, but we were put to our burden, and we've satisfied that burden, and Mr. Frezza did that.

Now, let's talk about a couple of things, and I'm -- excuse me, Your Honor. I'll be quick. Everything you heard goes to weight. Your Honor is right. Your inclination as you sat at the bench today was doesn't this go to weight, and it does, because they all go to argument. And so Mr. Bernick will say this, Your Honor, is how you would look at it. You just heard that. We'll do the same at closing argument, and then Your Honor will decide how to weigh Mr. Frezza's testimony in that construct.

There is no question on methodology. Mr. Frezza did the standard methodology for solvency analysis, adequate capital test, cash flow test, balance sheet test. Only one of his analyses used the Florence number, and however the Court decides at the end of the day to weigh that use of that number, it has nothing to do with the other tests that he did that did

not include that number.

THE COURT: Let me just put that issue to bed, because I can't see how on the plan on the table use of the Florence numbers is appropriate at all. So I can't see how, even in a weight analysis, I give any weight to that portion --

MR. PASQUALE: And that --

THE COURT: -- because that isn't the plan that's before the table.

MR. PASQUALE: And, Your Honor -- I'm sorry, Your Honor.

THE COURT: I'm sorry.

MR. PASQUALE: That's right. It is not, and it was proposed, because we wanted to be complete and be sure the Court had an alternative. You didn't hear much about that when Mr. Frezza testified, because we certainly agree with Your Honor that it's -- as of the effective date, that matters.

Now, we talk about --

THE COURT: Well, what matters I think is it's more than just the effective date issue. It's the --

MR. PASQUALE: It's the plan.

THE COURT: -- fact that -- that's right.

MR. PASQUALE: Yes.

THE COURT: This plan doesn't use Dr. Florence's numbers.

MR. PASQUALE: Correct.

THE COURT: And so I don't see how judging solvency in any concept can use numbers that no one has agreed are going to be incorporated into this or any other plan.

MR. PASQUALE: And Mr. Frezza's testimony, as Your Honor will recall, and we've certainly presented in our papers, almost all of it was based on the numbers in the debtor's plan.

Qualifications. Didn't hear too much about that today, actually, but earlier we did about is Mr. Frezza qualified to render this opinion. Mr. Bernick did say, oh, well, it's not just practical experience. We agree. It's not just practical experience. There has to be a reliable methodology. Mr. Frezza followed that methodology. Ms. Zilly said she would've done the same thing. Here's what a solvency analysis should encompass, and it's exactly the same. So there's no question about that.

Mr. Bernick had raised an argument orally at the trial about Mr. Frezza not being certified. I think we've put that issue to rest now, but just to be clear under both the American Society of Appraisals, which we've attached as Exhibit C, and the AICPA, certification isn't required for a solvency analysis. It's expressly carved out. And so if you want to render a valuation opinion, a business valuation in this court, an expert should be certified, but there's no such requirement for a solvency analysis. It is not a business appraisal. So that Mr. Frezza did not have that certification was irrelevant.

The quantification of liabilities, you know, I thought it was very amusing to hear Mr. Bernick address that and try to twist that around today. Mr. Frezza was quite clear in the TWA case that we cite and Mr. Bernick actually cited today -- makes quite clear there's just no issue. You take the stated liabilities from the balance sheet.

What's to quantify? Mr. Frezza didn't do any adjustments to the liabilities. He took the stated liabilities. And I think Your Honor, although this is not the premise of our argument, I think Mr. Frezza was perhaps confused on the question, because in answering a question from Your Honor at trial, he told the Court quantifying liabilities is what accountants do all the time. Just mention it, but I'm not -- he did testify, as Mr. Bernick said at trial, at his deposition, but he did answer Your Honor in that regard. But I think it's irrelevant for this purpose, because Mr. Frezza did not quantify liability. He took stated liabilities.

Mr. Bernick talked about GAAP. I don't want to spend a lot of time on that today, Your Honor. Mr. Frezza testified at length about GAAP and how that impacts the solvency opinion. It wasn't ignored. It was addressed directly by Mr. Frezza, again keeping with the well accepted methodology for doing solvency opinions.

I've changed my argument a little bit in light of what Mr. Bernick said, so I apologize for taking a little

longer to just be sure I hit my points.

Well, let me just wrap up on this, Your Honor, and that is Mr. Bernick used the phrase that what Mr. Frezza did was not the real world. Well, this is the real world. It's a confirmation hearing on the plan before the Court. There can't be anything more real than considering solvency as of the effective date under this plan, the settlements in this plan, and how that impacts what we say are the bank lenders -- bank debt holders' rights to post-petition interest under this plan. No point in making that argument under some other plan, and that's not what our objection is premised upon, and certainly was not what Mr. Frezza's testimony was premised on. Unless the Court has questions, I think that's all I have for now.

THE COURT: No. Thank you.

MR. PASQUALE: Thank you, Your Honor.

MR. COBB: Your Honor, Richard Cobb on behalf of the bank lenders. Very briefly to follow Mr. Pasquale. I think first and foremost Mr. Bernick has done a wonderful job of kind of throwing the dust in the Court's eyes with regard to who is seeking the default interest here at the correct rate, under the Bankruptcy Code, and under this plan. It's the bank lenders who've objected, and by constantly referring to the Committee did this, and the Committee did that, and the Committee was -- and the Committee was on board, and it was -- let's be very careful, Your Honor, that there is a group of

creditors here that have objected, and those creditors are pursuing this default interest. Lumping them under the Committee -- and we spent -- we'll spend lots of time on this in our post-trial brief -- is entirely inappropriate, factually and legally.

Secondly, Your Honor, Mr. Frezza does describe in detail the methodology that he used to perform the tests that he performed and make the observations that he made and why he selected the liabilities as he did.

Your Honor, we think the record is clear, there was no additional or other or, frankly, some difficult expert analysis that needed to be performed in order to determine whether Grace would be solid as of the effective date of this plan.

And, Your Honor, I almost am -- I'm apologetic to the Court that we've come this far, when this has been our argument all along and it's been over a year with the Court's time and arguments and papers on what is solvency and when does it need to be measured. We've always said it's solvency under this plan as proposed and if this plan demonstrates solvency, and equity is receiving a distribution, it stands bankruptcy law on its head, to not pay us the entire amount of the default interest provided for by our contract, unless you can prove that there's some bad conduct the bank lenders engaged in. That it's unfair and inequitable, based upon our conduct and,

therefore, we should not be entitled to receive the full amount of default interest. That's the only issue that's ever really been in dispute before this Court. We think their evidence is dramatically, dramatically falls short of the legal standard that this Court needs to apply in order to determine that it is unfair and inequitable if we're to receive the full amount of default interest.

Your Honor, the last piece is and I just want to drive this home, Your Honor, the last piece of this is, this Court under Mr. Bernick's world, when do you prove solvency? Do you prove it on the petition date, do you prove it a week after, do you prove it eight and a half years later, do you prove it the minute before the clock strikes midnight on the effective date?

Your Honor, it's their burden to show that they have satisfied 1129, it is their burden to demonstrate, and we'll make this argument in our papers, that the debtors are insolvent and, therefore, they don't need to pay us interest. If what they're conceding is that the debtors are solvent and, by the way, Your Honor, we don't give away money lightly, and that's why we're paying these guys 600 basis points, or whatever they're providing us, they are providing us post judgment interest under the plan but, Your Honor, the point is is that we're going to make the argument and we think it's well supported, that it is their burden to show that they don't have

to pay us interest. It's their burden to show that our conduct was so egregious that we're not deserving of interest. They can't meet that burden. Mr. Frezza's testimony is really uncontroverted by their expert, who has not submitted an expert opinion on solvency. She hasn't. Read very carefully what she has written in her only report issued with regard to Mr. Frezza and that is --

THE COURT: But, I thought she testified that she did not -- she was not opining about solvency.

MR. COBB: Very direct. Somehow she's come up with an opinion now, according to Mr. Bernick, on solvency. He used it in his reference that she has issued an opinion.

THE COURT: I think Mr. Bernick is correct. What she said is, that she couldn't determine solvency, but she was not offering an opinion about solvency and on, I think, cross exam, I don't remember who was asking what questions, she was asked whether the same analysis that she had used to determine feasibility would be the same analysis that she would use to determine solvency and, in essence, she said yes.

MR. BERNICK: No, no, no. That is not correct, Your Honor.

THE COURT: Well, okay.

MR. BERNICK: I'll go over it.

MR. COBB: You sure you don't want to start now?

THE COURT: Go ahead, Mr. Cobb. Gentlemen --

MR. BERNICK: Hey --

THE COURT: -- gentlemen, you're not going to do this. I told you at the last hearing that if you started this kind of bantering and bickering back and forth, I was going to throw you all out, and I mean it. Now, don't do it.

MR. COBB: Your Honor, I was in the middle of providing comments in response to the comments I heard --

THE COURT: Yes.

MR. COBB: -- and there was an exhibit placed on the ELMO and I don't know how to respond to that, Your Honor, because it's never happened to me before. So, I apologize.

THE COURT: Then you can ask me to do something about it, and I will. I don't want this continual bickering, gentlemen.

MR. COBB: Thank you, Your Honor. Your Honor, I'll sit down, but I think --

THE COURT: No, I wasn't asking you to sit down, I was just ask you to go on with your argument.

MR. COBB: Your Honor, in conclusion, this really belongs in the post-trial briefing and in our argument in January and you're going to hear most, if not all of this again.

The Daubert standard is designed to protect juries, lay people, from hearing expert testimony that is not deserving of being given any weight, whatsoever, because it doesn't meet

the Daubert standard. This is a bench trial, Your Honor has already heard it all, she can give it the weight it deserves, there is no reason, whatsoever, to strike his testimony.

THE COURT: Well, I think the gate keeping function of Daubert is different from that. I mean, the Court has to determine whether it meets the three R's, essentially, and if it does not, then the testimony doesn't come in. So, it's more that just protecting a jury from hearing it, and if it doesn't meet those standards, then this Court can't consider it either, and if it doesn't meet those standards, even though I've heard it, I won't consider it. So, I do need to know how it satisfied at least the Rule 702, 703 standards which, you know, Daubert, basically incorporates or explains.

MR. COBB: Your Honor, I'm not going to joust with you on that point. I can't disagree with you. But I would simply note that I think our papers directly address why it meets those standards and I think it is very clear that Ms. Zilly, based upon her own testimony, as the Court has noted, she issued no opinion solvency, whatsoever. Thank you, Your Honor.

THE COURT: Mr. Bernick.

MR. BERNICK: First on the point of the testimony by Ms. Zilly and Ms. Zilly was specifically called to the stand to address the question of whether solvency could be determined.

THE COURT: Right.

MR. BERNICK: That was the whole thrust of her testimony. She didn't issue a solvency opinion in the sense of saying, here is my solvency opinion, her opinion was, it could not be done because of the disputed nature of the liability.

THE COURT: Right. I don't think anybody is disagreeing with that.

MR. BERNICK: Well, no, they said that there was no opinion expressed regarding solvency. Well, it make an enormous difference, Your Honor. The whole problem here is that you couldn't have issued an opinion regarding solvency, this is not a case where it's clear what the liability was. This is a case where there was an assertion of massive liability and it was disputed and that has remained true all the way up to today. There is no plan that is in effect today, there's no plan that's agreed today because the plan that has been agreed is executory pending Your Honor's determination, including regarding this issue.

THE COURT: That's right.

MR. BERNICK: So, as we sit here today, she issued the opinion and it's the only opinion that matches the actual facts, that opinion is that you cannot determine solvency.

THE COURT: But when do we haves to determine it as of? That's the issue.

MR. BERNICK: As of -- that's correct, but it's really as of the effective date --

THE COURT: Right.

MR. BERNICK: -- before giving effect to the plan. I mean, you are now --

THE COURT: I see what you're saying.

MR. BERNICK: That's the whole thing. Is that -- but this is not the beginning of the case. We've now been through the entire case and as we go forward to the effective date, this is the problem so I put it in quotes, this whole as of problem. I did, I was talking with my colleagues, well, where does this term come from. It's a convention, it's used as cutoff point to make the code work and to make plans work. It is not designed, never has been designed, never has been found to be somehow the litmus test about when you determine solvency.

THE COURT: Yeah, I see what you're saying. Your argument as I get it, is that to say that you're solvent because the plan makes you solvent is, basically, an ipse dixit, it doesn't have anything to do with whether the reality -- of what would happen in the world absent that plan and then the question is, whether in determining the default rate of interest I have to give effect to the plan, or not.

MR. BERNICK: Exactly right. That's exactly right. That is to say -- well, that's exactly right. And we're not early on, we've got all of the evidence, we've got everything, but literally until this plan goes effective, I mean, goes

effective, the state of affairs is, there's a massive dispute about liability, there is a proposed plan that would resolve everything, but only if the interest rate is the one that we believe was agreed to historically and is fair and equitable and if that doesn't happen, it's not all of a sudden the liabilities have been extinguished, they're still there, but the operative issue that Your Honor has now hit upon is, well, what is the right answer, what is the right answer.

And if you take a look at the New Valley case, excuse me, the Valley View case, the court deals with exactly this issue, but I want to draw one last little chart here because I think there's a very logical and consistent way, indeed, it's the only way to make the code consistent, answer to the question to the question that Your Honor has posed.

So, we have as of the effective date and then there's plan or no plan, that is the issue. So, what we have heard from the other side are a bunch of different things and the question at the end of the day is whether there can be reconciled with the structure of the code. The code looks at default interest as a question of fair and equitable. And that's what all the cases have held, that this is the test, fair and equitable. So, that governs everything.

A statement was made, solvency is not the same thing as fair and equitable. That statement was made either by Mr. Pasquale or by Mr. Cobb. That's wrong. Solvency is part of

the analysis of fair and equitable. If there is solvency, then you get to the question of whether default interest is fair and equitable. Solvency for purposes of Chapter 7, in the best interest test is one thing, solvency for purposes of fair and equitable is another Chapter 11. And, under the fair and equitable test, there are all kinds of things that get brought to bear. Fairness and equity dominates everything. Nothing else, that's the test.

So, we now take a look at all of the circumstances, all of the circumstances. What's been the history, how was the plan put together, what does the plan do, could the plan have been achieved in some other way, what's been the history of the conduct of the unsecured creditors and the lenders in particular who are very ably represented here today by the esteemable Mr. Cobb. All of that is relevant. All that is germane to fairness and equity which then means Your Honor has to make the determination at the end of the day about what makes sense and this is really the heart of the whole issue.

We have full default rate, we have base contract rate, we have the plan rate. We picked the plan rate based upon history of negotiations and based upon the fact that liability was disputed, so there wasn't a clear case of solvency. You weren't clearly insolvent, you weren't clearly insolvent. It was in the middle and it corresponded with history. The essence of our position is, fairness and equity

requires consideration of all the factors and converges on, well, what should the interest rate be and solvency, particularly where it's disputed, that is the essence of our whole case, is that solvency is not a number, it is disputed and where solvency is disputed, the only way that you can look at fairness and equity about whether they get default interest is by acknowledging that it's disputed. You can't change in the course of a fair and equitable analysis, you can't change the fact about the dispute and pretend that once the plan has gone effective, it all goes away, so there was no dispute and then it's default interest. That's the essence of the problem, is that fairness and equity requires you consider the facts as they are before the plan goes effective in order to determine whether the plan is fair and equitable, before it goes effective.

Now, what we have in place of fairness and equity are all these other theories and Mr. Cobb was very candid when he said, our position has not changed. Well, what's their position been? First, it was market value of equity, pre-effective date, today, yesterday. That's what their position was, let's measure it before the plan goes effective. They argued that at length. Then it was, there should be a presumption of solvency, based upon the same fact. Then there was what we now have as the -- what we actually have as the argument, so long as there's one dollar of equity at the end of

the day, default interest. The cases doesn't say that. That wouldn't -- and then there's now the feasibility test of solvency. What is the common denominator of all of these different approaches? The common denominator is, they are all formulas, they all say that, and this would be great for the lenders if this could be the rule of law, that once we have market value as a positive, once we have solvency being presumed, once we have a dollar of equity, once we have feasibility, the analysis is over. It's all done and the difficulty with that is that that is not the law, the law is, this is a question of fairness and equity and then you say, well what facts does that apply -- and you have to determine that, before the plan goes effective. The whole idea is, where are we today and does this plan make sense in light of where we are today.

You can't say, well -- you can't have your cake and eat it too, we put the plan into effect, now there's solvency and now we say that there's default interest and, therefore, you modify the plan. It makes no sense.

THE COURT: Okay. Well, I'm sure this in either the record, the plan or something, somewhere, but I think it would be helpful if you and the lenders can figure out whether you can agree on a couple of facts that I think I may need to consider.

MR. BERNICK: Okay.

THE COURT: One is, what the amount of the -- I guess the shareholder equity in the company would be, as of the date of filing and as of the date of the plan. Two is, what the distribution percentage and number would be to that equity, and then the same information with respect to the lenders, to the lender group, because part of -- if I accept your analysis and I'm not making decisions now, I'm just looking to what you have to say.

MR. BERNICK: Right.

THE COURT: If part of the analysis has to incorporate the entire history, then it also seems to me that part of the composition that the Court has to consider is this return to the shareholders as opposed to the return to the banks. So, I want to know what that return is. Both in terms of raw dollars and in terms of percentages.

MR. BERNICK: Well, those are -- that's interesting. They're actually a little bit, you know, bank debt doesn't have returns like equity does.

THE COURT: Right, I understand, but under the plan, the bank is going to get the amount of its claims plus whatever the rate of interest is, which should generate a number.

MR. BERNICK: It does. Yeah, it does generate --

THE COURT: Okay.

MR. BERNICK: -- well that is in the plan. The plan itself calls it out.

THE COURT: I know that's what I'm saying. I know it's in a variety of documents, it's just that it would be -- you folks probably know this, more or less at the tip of your fingers, and I don't, so it would be helpful to have it stated somewhere.

MR. BERNICK: We'd be happy to do it, the question is, I just want to make sure that I understand what you want us to do. The plan calls out a rate of interest, we do have a record that exists of how much money in dollars --

THE COURT: Right, that would be.

MR. BERNICK: -- that would mean to the unsecured creditors under the plan.

THE COURT: Yes.

MR. BERNICK: Okay. Then what else did you -- what did you want with respect to equity?

THE COURT: I want to know what the amount of the claims are that are going to receive a distribution and what the distribution is, in terms of raw dollars, and in terms of a percentage, on the equity that remains in the company.

MR. BERNICK: There's no -- that's the problem. There's no distribution to equity. That is to say --

THE COURT: It's a value, though.

MR. BERNICK: No, it's not even a value. All it is -- old equity remains equity. There's no new equity. It is old equity, the old stockholders that are still -- that all

along are the new stockholders of the reorganized Grace. So, there's no distribution to them at all. What there is, is the expectation, in marketplace expectation or otherwise, we'll know what the stock is worth after the plan goes effective. There's stock values today, but we'll know what it's worth after the plan goes effective.

That, however, will be, again, the post fact world. I mean, and I understand Your Honor appreciates that.

THE COURT: I do appreciate that.

MR. BERNICK: But that's what we would be talking about, is how the stock will trade the day, God willing, we get to a confirmed and effective plan. So, we can't get that number, that's a question of projection. The numbers that you've seen in Mr. Frezza's report and the like, that deal with equity value, are either based upon the assets and liabilities in the pro forma balance, which is not the same thing as a market value, or they're based upon substituting for the asset value of the company, the enterprise value of the company. And enterprise value is something that he's estimated, that I think Ms. Zilly has also estimated for purposes of the Chapter 11 case.

So, Your Honor would have the enterprise value, less the plan distributions to creditors, which would then yield a delta, I think that actually is pretty much Mr. -- similar to Mr. Frezza's first number, which is about 670 odd million

dollars. But that is -- that's another thing. That's a marketplace valuation based upon the expectation about what the enterprise value is.

I'm not aware of anything that says at the time the bankruptcy was filed, you -- I mean the status quo was not different, vis-a-vis, the personal injury claimants and equity, that is to say, the demands of the personal injury claimants in this case became quantified but their position always was, that Grace was insolvent because based upon history, the liabilities were huge. That, in fact, has not changed.

THE COURT: I'm not asking -- I don't think that's what I was asking for.

MR. PASQUALE: Your Honor, may I just -- if I could just, sorry, Mr. Bernick, just to address the documentation.

MR. BERNICK: Sure.

MR. PASQUALE: We've already agreed on an exhibit, I don't have the number with me, Your Honor, that is a chart showing from the beginning of the case until, I forget the end date, but recent, that shows the amount of shares outstanding, the price for those shares, which will give you the market capitalization, throughout the life of the case, which would be the amount at those points in time that the outstanding equity is worth, the value of that equity. So, there is a document in the record that's been stipulated to, that we can site to and will, in our post-trial brief and be able to give the Court

some of that information.

THE COURT: All right.

MR. BERNICK: Yes, that's fine. The only thing I would say, Your Honor, is that there has been testimony and it was put before the Court in the context of the prior briefs, about whether that market value, at any point in time for the equity or for the debt, really tells you what the value of the company is.

THE COURT: Oh, I understand that.

MR. BERNICK: Because they're all anticipations about what's going to happen with this case.

THE COURT: Well, I understand, but one problem I'm faced with, which I'm not always sure I agree with, is the TWA view as to how you go about taking a look at the net worth of the -- or the worth of the company and so, I'd still like to have that information.

MR. BERNICK: Okay. So, you want the trading price of the stock over time?

THE COURT: Sure, and I think -- I understand that that's going to change on the effective date, I don't know how anybody can know what that will be on the effective date, so that's a difficult thing to project but, nonetheless, there are probably some people who have given it some pretty good estimates.

MR. BERNICK: Yes. Well, but the -- and I'll sit

down here in a second, both Ms. Zilly and their prior expert, a Mr. Ordway, addressed it, that was one of the first things was, what happened to th stock value, and they both said, I know Ms. Zilly said, I'm almost positive Mr. Ordway did, indeed we originally designated this testimony, that that price for the stock over time doesn't reflect anything other than a whole variety of factors including what might ultimately happen in the case, long before it happens.

So, it's not -- it's just a prediction, it's not a valuation of anything.

THE COURT: I understand.

MR. BERNICK: Okay. Well, we'd be happy to provide that -- I'm sure we can figure it out.

MR. PASQUALE: It's already, as I said --

THE COURT: Okay.

MR. PASQUALE: Your Honor, I just want to close with one thing, and that is, even in Mr. Bernick's reply, it's closing argument. This is the issue that we disagree on and well will -- I agree, it's the ultimate issue. We will have to convince the Court of our view and Mr. Bernick will attempt to convince the Court of his view for his client. It has nothing to do with the admissibility of Mr. Frezza's testimony, because if Your Honor agrees with us, Mr. Frezza's testimony fits the issue exactly, and it's not a matter of methodology, it's not -- excuse me, it's not an issue of methodology, it's not an

issue of qualifications, it's closing argument. The evidence in the record is necessary for the factual predicate, the expert testimony for those legal arguments, there's no basis to exclude Mr. Frezza's testimony.

THE COURT: Well, I agree with that. It seems to me that the -- you do have to lay the predicate. I asked for evidence concerning the solvency issue because I needed to hear what it was going to be, now I've heard what the testimony is. If it turns out to be irrelevant because I don't agree with the bank lenders viewpoint, then at that point I suppose it doesn't fit and I won't consider it, because it doesn't fit, but I'm not sure that in that -- that right now, I can judge it as a Daubert issue because it seems to me that it does support the lenders viewpoint and if that viewpoint is adopted, then there's testimony in the record that supports it. So, I don't see it as striking Mr. Frezza's testimony, but I do think it's something the Court has to weight carefully, in determining where I think the law takes me on this issue.

MR. PASQUALE: Thank you, Your Honor.

THE COURT: Okay. I'm going to -- I will deny the motion to strike. I think this goes to weight for the reasons that I've just expressed. I agree it does not fit the debtors view, it does fit the lenders view, it's the lenders expert in their case and for that reason, I'll take an order from -- who's going to submit it, that denies this motion?

MR. PASQUALE: We'll take care of it.

THE COURT: All right.

MR. CONLAN: Your Honor, I apologize for interrupting, may I be excused? Our portion is --

THE COURT: Yes, sir.

MR. CONLAN: Thank you very much.

MR. BERNICK: Same for me, Your Honor, may I be excused?

THE COURT: Yes, sir. This order, Mr. Pasquale, if you don't mind, I'd like it clear that I'm reserving the weight to be attributed and whether or not, if I don't agree with the lenders and Creditors' Committee view, at that point it doesn't fit the evidence and may be subject to that type of motion, but for now it seems to me that that's not correct approach.

MR. PASQUALE: Well, Your Honor, if I may on that, certainly Your Honor, it's your responsibility to weigh evidence.

There is an issue, however, as far as -- you know a motion like this for Daubert, with respect to Mr. Frezza and his own reputation.

THE COURT: Oh, no, no, I wasn't talking about re-upping a Daubert issue, I was just simply saying that if I think it doesn't fit, I can't attribute any weight to that testimony.

MR. PASQUALE: Okay. Of course, Your Honor,

understood and we'll reserve that, put the language in the order.

THE COURT: All right. Yes.

MR. PASQUALE: Thank you.

MR. BERNICK: Thank you, Your Honor.

THE COURT: Thank you. Give me one second, Ms. Baer.

MS. BAER: Sure.

THE COURT: Okay, thank you.

MS. BAER: Your Honor, what that leaves is two matters. Number one the debtors objection to the claim of Munoz, which is the second agenda item, it's specifically their response to our objection, it's item f of the second item and then item number 23 on the agenda, which is the Munoz matter to lift stay.

Before counsel for Munoz argues the lift stay matter, I just wanted to address the objection matter for a moment.

THE COURT: All right.

MS. BAER: Your Honor, the omnibus objection, the 25th omnibus objection was filed on August 26, 2008. It was not an objection to Munoz alone, it was and objection on an omnibus. On the Munoz claim the objection was no liability. That objection was filed as part of the omnibus because the debtors books and records did not show any liability and, frankly, it was filed in order to sort of start a dialogue, if you will.

Your Honor, a dialogue has been started and at this point in time we don't see that that objection to the claim is going to be resolved and, in fact, the ultimate response from Munoz was to file the lift stay.

Your Honor, the debtor is in the position that it has a number of alternatives on how this matter should be addressed and based on where the debtor is and especially based on where we are in confirmation and being in the middle of doing post-trial briefing, and ultimately having the closing arguments in January, the debtor is in a position where it does not seek to go forward on the merits of the claim objection at this time. It has a number of alternatives with this claim. Obviously, it could ultimately settle it. It probably needs to, in fact, take discovery. The discovery on the case stopped when the case was filed eight and a half years ago, when we filed Chapter 11.

There's a potential that we could use the ADR process in this case to mediate the claim, but we're not there yet. Given how old this claims is and how discovery has not taken place, there is still the option that we could remove the case to this court. The removal order entered by this Court gives us until the effective date to do so or, ultimately, we could agree that the stay should be lifted and it should go back to the California state court, but we're not in a position right now to make that determination. We're not familiar enough with

the case anymore after eight and a half years, to make that determination.

What we would like to do, Your Honor, what we would suggest would be the best thing to do here is that we either dismiss our motion to object to the claim without prejudice to reasserting it again and at the same time have the motion to lift stay dismissed to be reasserted, probably when we reassert the claim objection, after the effective date.

The plan of reorganization here, Your Honor, calls for a period of 180 days after the effective date to address all remaining claims. The debtors in the position of having probably a hundred different contested litigation claims that it needs to address and, again, has all of the various alternatives in its quiver as to the best way to address each and every claim.

Given where we are now, in the middle of the confirmation process, hopefully, closing this process out and getting it before Your Honor to make a decision, is about the worst time in the world to lift the stay and begin arguing and doing discovery and getting ready for trial on a contested matter that is, you know, sort of a combination of employment discrimination, harassment and various tort as well as contract and common law theories.

So, under these circumstances, Your Honor, again, what we're suggesting is on the claim as well as the lift stay,

that things be delayed until a time when the debtor is in a position to actually address the merits of the claim and determine what is the best alternative for going forward with the claim.

With that, Your Honor, I'll sit down, as I know that counsel for Munoz wants to argue the motion to lift stay and then I'll respond.

THE COURT: All right. Good morning.

MR. ALLINSON: Good morning, Your Honor, Elihu Allinson on behalf of Gloria Munoz. On the telephone is my co-counsel, Anthony Petru from the Hildebrand, McLeod & Nelson, Inc., law firm in Oakland, California.

I think I'd like to start with addressing the claim objection. Just a few comments on that, but before I do, I want to make the Court aware, this motion and this claim objection, have nothing to do with asbestos liability. This is an employment discrimination and sexual battery claim, that was brought against the debtors, prepetition, in California state court, by a production worker, a $34,000 a year production worker and the debtors San Leandro, California plant, which I believe is in Alemeda County, a plant that made Darex, which I understand is some kind of a lining for food containers and can be an additive for concrete and things like that. And this person's job, Ms. Munoz's job, was pretty much stirring, mixing chemicals, very line oriented work.

The claim objection. We objected in our stay relief motion to the 25th omnibus objection on two grounds of the local rules. One, that to the extent that Ms. Munoz is asserting a personal injury claim and she has raised sexual battery, intentional infliction of emotional distress, negligent inflicting of emotional distress, that this Court doesn't have jurisdiction over the claim and, therefore, it was improper to include it in th 25th omnibus claim objection.

THE COURT: Well, that's actually not correct. The Court has clear jurisdiction over all claims. The only thing this Court cannot do is try the personal injury or wrongful death claims. There is absolutely nothing that says the Court doesn't have jurisdiction over it and, in fact, in most instance, we go through the whole way through the discovery processes before the claim is returned wherever it's going to go for trial. So, the only thing that the core, non-core issues address is whether or not the Court can try the case. It does not, in any way, prohibit the Court from asserting jurisdiction over claims.

MR. ALLINSON: Your Honor, with all due respect, I would refer you to Local Rule 3007-1(f)V, which states as follows: "The court will not consider any substantive objection to personal injury or wrongful death claims that would be in violation of 28 U.S. Code 157(b)(2)(b).

THE COURT: Right. That means the court won't try

them. Won't consider them in violation of that section, means I can't try them. And it certainly doesn't mean I don't have jurisdiction over them, in any event. So, I mean the whole -- otherwise, this Court could never hear an asbestos claim because every single asbestos claimant and there have been at least, I don't know, 17 or 18 of them now that have gone through plan confirmation, involves personal injury claims. That makes absolutely no sense. It would prohibit somebody from filing an asbestos or any other type of mixed dust claim, or case, it the District of Delaware. So, that interpretation is doesn't make sense.

MR. ALLINSON: Very well, Your Honor. We also objected to omnibus 25 on the issue that it mixed a substantive and a non-substantive objection, in violation of the same local rule. Those were our two objections to the claim.

I understand that the debtors have withdrawn it, or continued it, until next month. We -- I'm hearing from counsel that that's not correct, so --

MS. BAER: Your Honor, I just made it very clear at the beginning of the hearing that this particular one we have not made a decision on. We pulled it out, if you will, the 25th omnibus schedule of continuing everything until next month so we could address it now and decide in the context of the lift stay, what to do with it.

THE COURT: All right.

MR. ALLINSON: Well, Your Honor, I thought the agenda said that as to Ms, Munoz, the 25th omnibus objection was continued to next month's hearing, but I may have misunderstood.

THE COURT: Well, it can be continued, I don't think it makes a difference at this point because, look, even with respect to the lift stay, I appreciate the fact that Ms. Munoz was not injured by exposure to asbestos, but she is not the first debtor in this very long case now that has attempted to get back into the state court to try a non-asbestos related case. And I have routinely denied that relief and the reason is because it is a claim that the debtor can reconcile through its plan confirmation process. If that doesn't happen, then at some point, yes, this claim obviously has to be liquidated, so that the debtor knows how much it's going to have to pay, the reorganized debtor knows what it's going to have to pay, but this is not the time to grant relief from stay in this, or any other, similar circumstance because the debtor is in the process of figuring out the plan confirmation processes.

I know it's been a very long time, I'm sure I regret that as much as every other party in the case does, but it's just the way this case has come down.

MR. ALLINSON: Well --

THE COURT: So, I think that with respect to the objection to claim and to the relief from stay, the idea that,

perhaps, you go to mediation is probably a good one. These are serious allegations that the plaintiff has made, the plaintiff in the state court action has made and it seems to me that taking the opportunity to try to mediate or arbitrate, whatever you prefer, the underlying matters that would go back to the state court and the debtors' objection to claim is probably a good one.

MR. ALLINSON: Well, Your Honor, maybe I can ask Mr. Petru, if he is on the line, whether there was an attempt at mediation previously, in the state court action and, I guess, a follow-up question to Your Honor would be, even if not, would alternative dispute resolution have to take place here in Delaware or could it take place in California, where the debtors already have local defense counsel?

THE COURT: It can be wherever you want it. If you want it in California, that's fine.

MR. ALLINSON: The other thing I would ask the Court to consider is, since this doesn't appear to be the time to grant stay relief, rather than coming back with a renewed motion, would we set now a prospective deadline by which if the matter hasn't been resolved, stay relief or relief from the plan injunction, automatically becomes effective.

THE COURT: No, I won't do that, but what I will do is give you a new date to raise the issue by way of argument because I'm not attempting today to get to the merits of

whether it should or shouldn't be granted on the merits. I'm simply saying that procedurally, at this time in the debtors reorganization, where they're getting ready for post confirmation briefing and we have the arguments on the plan confirmation itself set in January. This is not the time to force the debtors back into state court on a pretty serious matter.

I will force them into an arbitration issue, I'd prefer to do that even after the confirmation, because I think even that may be somewhat disruptive, but that's preferable to starting wholesale litigation again.

So, I'll give you a continued hearing date, if you like, rather than dismissing this motion, but not an automatic relief.

MR. ALLINSON: Well, I'll certainly take the continued hearing date over a dismissal but let me ask for a clarification. Is Your Honor stating that we can begin an ADR procedure in California now, or are you saying that we must wait until confirmation?

THE COURT: Ms. Baer, what would the debtors -- would and ADR position at this point jeopardize the reorganization?

MS. BAER: It would, Your Honor. The supervisor on this case is Richard Finke, who is in the courtroom today, you know that he is responsible for getting this company through the confirmation process. To begin an ADR process is like

beginning, you know, the case again. So I would say that that would be a very, very difficult position to put us in until after we're done with all the confirmation matters.

THE COURT: All right. All right. So February because the arguments will be done in January, so I'd say February for an ADR?

MS. BAER: Your Honor, maybe the thing to do is to continue our claim objection and continue the lift stay motion to February, in the meantime, we can think about, from a merit standpoint, what's the best way to proceed with this case to get it to completion.

MR. ALLINSON: Well, Your Honor, I think they've had plenty of time to think about that and we've been invited to negotiate with them and we've actually received no response to our settlement offer, so I find that suggestion disingenuous.

I think at the very least, we should have a date certain by which we can start ADR. And I would also request, and it can be at the end of the 180 day window after the plan goes effective, that if the ADR hasn't been successful or if the issue hasn't otherwise been resolved, that automatic stay relief, relief from the plan injunctions take effect at that time. I don't see how that prejudices the debtors in any possible way. It gives them the full opportunity, under Article 5 of the plan, to try and resolve this and if it can't be resolved, then Ms. Munoz doesn't have to spend more money to

send me here again to raise these same issues.

THE COURT: Well, okay, in terms of having you come, I understand that the phone participation still involves your time, but it doesn't involve the travel expense and you certainly can participate by phone, I have no problem with that issue, especially when it's going to be some type of procedural issue that's going to be discussed as opposed to some argument on the merits, but I'm not uncomfortable at all if you wish to do it by phone. People, obviously, deal by phone all the time. We have a hundred, probably on the phone today. So, if that helps with the expense side, that's fine.

I think the best result is for me to set a time period within which if you agree to go to ADR and I guess that's what I'm trying to find out from you, whether your client is willing to go, when that should happen. And at the end of that period of time, set you back for a status conference if it hasn't been resolved, so that we can figure out where to go next, and I think you'll be in that 180 day window if the plan has been confirmed by then, and if it hasn't then that doesn't stop me from deciding the issue anyway. So, is she willing to go to ADR? You had wanted to ask Mr. Petru whether --

MR. ALLINSON: Yeah, I just don't know the answer to that question. I don't know whether he's on the line or his colleague, Ms. Quynn Nguyen, is on the line and even if

they are, whether they're prepared to respond to that at this time.

THE COURT: Let me find out. Is anyone on the phone representing Ms. Munoz, who would know whether or not there was some, either mediation or arbitration process started before the bankruptcy was filed? If there is someone and their lines are on mute, can the lines be unmutted for a moment, please?

COURT CALL OPERATOR: Certainly, one moment, Your Honor.

THE COURT: Thank you.

(Pause)

THE COURT: Are the lines unmutted?

COURT CALL OPERATOR: There's quite a few, Your Honor, I'm still working on it. I apologize.

THE COURT: Oh, I'm sorry. If you just let me know, please.

MS. BAER: Your Honor, in the meantime, I'd ask a question, which is, this Court has entered an ADR order and set up and ADR procedure and we have a mediator and the question I would have is, whether or not we would use that procedure or what procedure counsel is referring to, because I don't clearly know what the California procedure is and in what context it would be done. I'm very familiar with our procedure here and our mediator and certainly that has some logic to proceeding that way, that's what we've done with other contested claims.

THE COURT: I think the issue that I was attempting to address is the location not the who the mediator would be and from my point of view, based on the fact that Ms. Munoz is in California and the debtor has a plant there, I don't see why the mediation itself could not take place in California.

MS. BAER: Your Honor, first of all, our mediator has, in fact, mediated a case in California, we are not wedded to have to do them here. We have gone and used these procedures in many places. Second of all the plant is closed down, Your Honor. We do not have a presence in that area any more.

THE COURT: Oh, okay. But you're still willing to go to California?

MS. BAER: Your Honor, if -- that may have some logic to it. Again, our mediator has gone to several different places. My question was more of procedures, what rules are we using, what ADR process are we using, where do we get the mediator from and we already have that set in this court, so there's a logic in using that process here.

THE COURT: And frankly, it's been pretty successful.

MR. ALLINSON: Your Honor, it may be, I simply haven't reviewed it yet, and I don't know whether it would be acceptable to my client and co-counsel or not.

THE COURT: Yes.

MR. ALLINSON: I have noticed at Exhibit B to our

lift stay motion which lists all the pretrial activities that have occurred so far, that an ADR case management conference was held in the California state court action on February 17th of 2000. I don't know whether that conference was anything more than a status report or whether anything material came out of it.

THE COURT: All right, are the lines unmutted?

COURT CALL OPERATOR: Yes, Your Honor, they are now.

THE COURT: Okay. If I could ask, again, then please, is anyone on the phone representing Ms. Munoz?

MS. NGUYEN: Good morning, Your Honor, this is Quynn Nguyen, I'm appearing for Anthony Petru. No, there's no been mediation or arbitration process and I think we'd be open to some kind of mediation process within the time that you mentioned.

THE COURT: All right. So, I think that's -- there's the answer. I think, then, perhaps what I need to do is just give you two the opportunity to figure out what that process is. The process here has, I think, been relatively successful. It's -- I think it's been pretty well documented in this case that the mediator has done some pretty good work. Not everything will settle, obviously, but many things do. So, I can recommend that process, but if your client is uncomfortable with it, then I think you can talk to the debtor and see whether or not some other process can be agreed upon and in

California, if that's where you want it, is fine.

MR. ALLINSON: And, Your Honor, if my client and co-counsel are amenable, can we begin the process sooner rather than later, that is not have to wait until February 1st or post confirmation?

THE COURT: Well, I think waiting till February, based on the fact that the principles of the debtor, who are going to have to attend or participate in some fashion in that mediation, also engaged in the plan confirmation right now would be a problem. So, I think February should be the month.

MR. ALLINSON: Well, I also note, Your Honor, that the debtors are ably represented by Seyfarth Shaw in California on this matter.

THE COURT: Well, I'm not sure it's the issue of counsel, I think it's an issue of the officers, directors, employees of the debtor who would have to input somehow or other into the process. I believe that's the issue.

MR. ALLINSON: I believe that the plant was -- this plant was closed in March of 2009. I believe that the witnesses, so to speak, are no longer employed by the debtor but if Your Honor isn't persuaded, we can --

THE COURT: Well, I don't think you need witnesses for the mediation, that's not --

MR. ALLINSON: Well I would assume that the debtors senior executives can receive reports from their counsel as to

how the ADR is proceeding without disrupting them.

THE COURT: Oh, I see what you're saying.

MR. ALLINSON: Yes.

THE COURT: Yes, they could certainly receive reports but I really do not want the distraction from the plan confirmation. This is the most highly contentious plan confirmation process I have ever been involved in, there are a gazillion issues and I do not think this would be the -- that's a term of art, gazillion --

MR. ALLINSON: Understood, Your Honor.

THE COURT: -- that I do not think at this point should be added to as a distraction for the debtor. So, I know it's been a long time, but February is three months from now, I don't think that that three month delay will cause a problem.

Now, in the meantime, I think you and Ms. Baer should work out the process, agree on the mediator, set the time and place, get the mediator line up so that in February mediation can actually take place.

MR. ALLINSON: Okay. And will it be February or will it be February, assuming confirmation occurs in January?

THE COURT: In February, no matter what.

MR. ALLINSON: Okay. And I guess two other issues of clarification. Do I need to appear next month for --

THE COURT: No.

MR. ALLINSON: Omnibus 25.

THE COURT: No, sir.

MR. ALLINSON: Will that be continued?

THE COURT: I will give you a continued date, right now, if anybody knows when my continued calendar is for next year. I'm not sure I do. Wait till I see.

MS. BAER: Your Honor, I can give you the -- well, I know the March date, I don't know February date off the top of my head.

THE COURT: Well, actually, I think the March date may be the best one to continue it to, because if you do arrive at a settlement, you're going to want to file something and if you don't, you probably need some time to talk, to see how you're going to try to resolve the motions, not the underlying liabilities.

MS. BAER: Your Honor, the March omnibus date is March 22nd, and what I would suggest is that the debtors omnibus objection and the motion to lift stay both be continued to the March 22nd date.

THE COURT: The omnibus, that's item 2, correct?

MS. BAER: Item 2 and 2(f) is their response to our objection.

THE COURT: All right, and only 2(f) though. The rest of them were continued to another date.

MS. BAER: Yes, until next month.

MR. ALLINSON: Your Honor, as far as continuing the lift stay motion, I just wanted to seek clarification, one last time. Was your -- it sounded to me at one point like Your Honor was, perhaps, amenable to having some sort of a springing date, perhaps at the end of the 180 day period.

THE COURT: No, I don't think so. I think what I said is, I'd continue it to a hearing date so that we can then discuss on the merits whether or not relief from stay is appropriate.

MR. ALLINSON: Very well. Thank you, Your Honor.

THE COURT: So, March 22nd?

MS. BAER: Yes, Your Honor.

THE COURT: All right. And you may call in, if you want to call in, for you.

MR. ALLINSON: It's no trouble for me to get here.

THE COURT: Okay.

MR. ALLINSON: Thank you.

MS. NGUYEN: Thank you, Your Honor.

THE COURT: All right, thanks. In the meantime, to the extent that it would otherwise be a violation of the stay for you folks to attempt to get this lined up for mediation, I'm lifting the stay for that purpose. So any discussions leading toward mediation, arbitration, whatever you determine to go to, the stay is lifted with respect to that and for the mediation/arbitration to occur, but not for any other purpose.

MR. ALLINSON: Thank you, Your Honor. And I will submit Ms. Nguyen's motion pro hac vice. I do appreciate you're permitting her to appear by telephone today.

THE COURT: All right, that would be fine, thank you.

MS. NGUYEN: Thank you, Your Honor.

THE COURT: Okay, thanks very much. Operator, you can mute the lines again, thank you.

MS. BAER: Your Honor, the only other matter that's on your agenda is just a basic placeholder for confirmation status. There's nothing specific that the debtor seeks to address at this point, everything is moving along in terms of timing, but we do note that the Court has not yet signed the post-trial briefing order, although we're all complying with it. And I just wanted to bring that to the attention of the Court.

THE COURT: Yes, I haven't because I received two forms of order and I thought, perhaps, it was related to this status conference and we would discuss it today. So, that's where I would like to head next.

MS. BAER: Your Honor, I'm certainly willing to discuss it. We tried to work out the form of the order with Mr. Speights. Everybody else was in agreement on the form of the order and the real question was, what goes into the alternative briefing schedule for the Anderson Memorial matters. And it was our understanding from our takeaway at

court that the Anderson Memorial matters that went into the alternative briefing schedule were specifically discrimination as to Anderson Memorial, classification of their claim and good faith, which are issues unique to Anderson Memorial and that issues that are not unique to Anderson Memorial, specifically mentioned at the hearing, which were feasibility, and best interest, were on the same briefing schedule as everybody else.

We asked Mr. Speights whether that was agreeable and I believe that they took the position that the only issues that were -- that all issues were on the alternative briefing schedule, other than best interest and feasibility.

THE COURT: All issues related to Anderson Memorial.

MS. BAER: Right.

THE COURT: Well, I think that's correct, except that I'm not aware of what other issues there are related to Anderson Memorial.

MS. BAER: That's where we left off, Your Honor. We actually asked Anderson Memorial if they could specify what are the other issues, so we could make sure that the order made it clear what they were and which briefing schedule they were on and Anderson was not able to give us a response to that, which is why we came to this point of filing the alternative orders.

THE COURT: Mr. Speights, are you on the phone?

MR. SPEIGHTS: Yes, Your Honor, can you hear me?

THE COURT: Yes, sir, thank you.

MR. SPEIGHTS: Your Honor, actually, I've had no discussions with the debtor regarding this. Mr. Kozyak was dealing with Mr. Bernick, I believe regarding this. So, I'm not the one to respond to it, but I believe Mr. Rosendorf is on the phone if Mr. Kozyak is not and can respond to Ms. Baer.

THE COURT: All right.

MR. ROSENDORF: Yes, thank you, this is David Rosendorf. My partner, John Kozyak is in court on another hearing this morning, but I am generally up to speed on this.

Your Honor, it really is sort of a very simple issue which is, I think in large part that the characterization of the common issues, so to speak, that are supposed to be briefed on November 2nd, by us, as well as other parties, is largely correct. I think that the identification of individual Anderson issues is also largely correct. The only concern, I think that we have, that we don't want to be hamstrung on when it comes to the briefing is, quite candidly, you know, there are a number of issues that we raised in the multitude of various prehearing confirmation briefs that were filed and we do not want to be faced with the scenario where, frankly, not having reviewed every word of every other of the dozens of briefs that were filed by other parties here, that somebody argues that we somehow waived an issue or lost the opportunity to brief it, by not having raised it or argued it, in our November 2nd brief because that issue appears somewhere else in

one of the dozens of other briefs that were filed by some other party.

THE COURT: Well, how would you be briefing an issue that you hadn't raised?

MR. ROSENDORF: Well, I'm not saying that we are. The point, Your Honor, is that while we certainly -- we know and we've certainly laid out in extensive detail the issues that we have raised, we don't necessarily know, certainly didn't know in the, you know, roughly 24 hours or so that we were presented with this order, what other issues were raised by the dozens of other parties that filed confirmation objections which arguably might have some commonality with the Anderson issues.

We believe the debtors have identified those that they believe are the common issues, best interest and feasibility, and we concur that those are issues that other parties have raised and that we're prepared to brief on the 2nd.

THE COURT: Okay. But I'm still confused. The brief from Anderson would be on Anderson's issues, whether it's on the common issues, or whether it's on the Anderson Memorial only issues, Anderson is only going to brief issues that it thinks it has. So, if some other party has raised and briefed an issue, how does that affect Anderson?

MR. ROSENDORF: The only way that it arguably would,

Your Honor, is if the debtors somehow argue that because there is an issue that Anderson has raised, which we think of as an issue that we, perhaps, have uniquely raised, but which some other party has also raised in its brief, that we are somehow foreclosed from briefing that issue in our later brief.

THE COURT: Okay. I don't think that's the intent. No one is trying to use this as some kind of strangle hold on what Anderson is going to brief. I think the issue is, what objections did Anderson have to the plan as to which there was evidence that Anderson is now going to submit these post-trial submissions about and as I understand it, the issues were the best interest and feasibility that any other party has raised and should be briefed on the same schedule because the evidence was finished as to that first, and then the issues related only to Anderson, as to which the Court heard the trial at the end of the trial process, were the discrimination classification and good faith issues and if there was anything else, I think you should say what it is so we know that those additional facts are also supposed to be briefed, but I don't recall any others. There was a lot that went on, Mr. Rosendorf, so I may have forgotten, but I don't --

MR. ROSENDORF: I agree and I think focusing as you have on those that there was evidence presented on, I think that that's right. I think that that's right.

THE COURT: Okay. So, I think the order, then,

actually both of your orders are pretty similar, so I think the orders really get to the same point, which is, best interest and feasibility should be addressed by all parties by November 2nd, and the issues that are clearly unique to Anderson, which are defined here as discrimination, classification and good faith, are to follow the supplemental schedule. If Anderson identifies another issue, you need to let Ms. Baer know that immediately so we can add it to an order for the supplemental briefing schedule. But otherwise, I'm looking at briefs on those five issues from Anderson.

MR. ROSENDORF: Okay. And I -- just to make to clear, Your Honor, I think that there are other legal issues that we may have raised in our brief, for instance, with respect to release and exculpation clauses, but there was no evidence presented by parties with respect to those and so, it's not -- it is not a matter as to which any factual matter was presented at the trial.

THE COURT: Okay, but those issues have been raised by other parties, too.

MR. ROSENDORF: And that's the point of clarification that we required, Your Honor.

THE COURT: Oh, okay. Then it's -- I see what you're saying.

MS. BAER: Your Honor, what -- I think this is the heart of the issue. Those issues should be briefed by November

2nd.

THE COURT: Correct. They should be briefed by November 2nd. Because they're not related just to Anderson, they are not peculiarly Anderson issues. The discrimination, classification and good faith issues are related specifically to Anderson Memorial's claim and maybe that's the best way to define it. The rest are general plan objections and maybe that's the better way to describe it, I think.

MR. PASQUALE: Your Honor, if I may, Ken Pasquale for the Committee. I'm a little confused by that comment, only in the last part of this. I had thought that if there was no evidence, the Court didn't want that rebriefed. That --

THE COURT: I don't want rebriefs.

MR. PASQUALE: Okay.

THE COURT: No. What I -- if you're going to make an argument on those, you can point out to me where in the briefs you've already raised them. What I'm really looking for are briefs in the nature of post-trial submissions of findings of fact and conclusions of law and how they tie into the objections that you've raised. So, if it's pure legal argument and you've already briefed it, I don't need a brief, but if you haven't briefed it, and you want to brief it, it's due by November 2nd.

MR. PASQUALE: Thank you.

MR. ROSENDORF: Okay. That's really what we wanted

to understand, Your Honor. Is that those arguments that were legal arguments, that we had raised, which might be in common with other parties, did not disappear and were not somehow waived as a result of this briefing schedule.

THE COURT: Oh, no. I don't think anybody has waived anything with respect to briefing these issues or submitting proposed findings and conclusions, this is just a schedule to try to get it done in a fashion that makes sense and so that at some point, I have this mass -- some handle, I guess, on this mass of evidence that's been submitted.

MR. ROSENDORF: Okay. Thank you.

THE COURT: So, okay, then I don't know whose order this is, that I'm looking at. It's the one at 23520.

MS. BAER: That's the debtors' order, Your Honor.

THE COURT: Okay. I think this one is okay. I do want -- I notice that Anderson took out the one sentence in this order that indicated that the Court could not determine different times even though the parties can't, but I am reserving the right to determine different allocations of time, if necessary. I think I said that at the argument. I hope not to do it, but if something just absolutely unforeseen in my mind, or if I end up asking a series of questions that sidetrack people, I want the opportunity to have a full and fair argument. So, I am reserving the right to reallocate for those reasons. So --

MS. BAER: Your Honor, in fairness we added that at the last minute and so I think when Anderson copied our order and then changed it, they didn't have that sentence. So, that's -- I don't think they purposely wanted to take that away from you.

THE COURT: Okay. Oh, okay. Well, I don't know the sequence of events, so thank you that, for correcting that. So, I will sign the debtors' order. I think this record then is clear as to what's happening. Mr. Rosendorf, is that okay with you?

MR. ROSENDORF: With that clarification, I think so, Your Honor. Thank you.

THE COURT: All right. Then I'm entering that order and I'll have it docketed.

MS. BAER: Thank you, Your Honor.

THE COURT: Okay. Anyone else have any plan issues to address? Confirmation process issues to address?

(No audible response)

THE COURT: All right, we're adjourned. Thank you.

MS. BAER: Thank you, Your Honor.

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C E R T I F I C A T I O N

We, PATRICIA REPKO & ELAINE HOWELL, court approved transcribers, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter and to the best of our ability.

/s/ Patricia Repo
PATRICIA REPKO

/s/ Elaine Howell Date: October 28, 2009
ELAINE HOWELL
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